



# State Agricultural Disparagement Statutes: Suing Chicken Little

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## State Agricultural Disparagement Statutes: Suing Chicken Little

### “The Sky is Falling”

Our culture relies heavily on television as a source of information. We make decisions based, in part, on the opinions and conclusions of “investigative” news reporters and popular celebrities. At the same time, these media outlets must find and create programs that will make the public watch. The traditional method of gaining television viewers has been to increase the entertainment value of the programs available. During the last decade, however, the media has increasingly touted its status as a social “watchdog” - convincing viewers that their programs will provide valuable information necessary for preservation of the public’s livelihood. Although there may not be actual truth in what the public hears on television, it has a significant effect on market decision making and can be ruinous to targets of the media’s attention.

Within this cultural context and the \$500 billion food industry in the United States, individual states have sought to protect their economies by guarding their agricultural industries.<sup>1</sup> In the wake of the landmark case , *Auvil v. CBS “60 Minutes”*, where common law disparagement failed to protect the plaintiffs, at least 13 states have enacted agricultural/perishable product disparagement statutes as a warning to disseminators of public information. These statutes were enacted to ensure that claims critical of a state’s agricultural industry are not merely false creations by the media, designed to produce a public scare and increase ratings.<sup>2</sup>

Disparagement statutes are unique from their oft-cited counterpart, defamation claims, but are part of the

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<sup>1</sup>See Michael R. Taylor, *Preparing America’s Food Safety System for the Twenty-First Century—Who is Responsible for What When it Comes* 52 FOOD & DRUG L.J. 13, 13 (1997).

<sup>2</sup>See J. Brent Hagy, Comment, *Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act*, Tex. Tech L. Rev. 851, 858 (1998).

same genre of tortious acts as “injurious falsehood”.<sup>3</sup> Disparagement is an injury to an economic or property interest based on a false statement of fact.<sup>4</sup> A disparagement defendant would be someone who seeks to prevent others from dealing with the plaintiff by making false and negative statements about the title to her property, the quality of her property, or the quality of her business.<sup>5</sup> Legislative history indicates one state’s desire to “protect farmers from food safety scares”.<sup>6</sup>

Also called perishable product statutes, and more cynically known as “veggie libel” laws, agricultural disparagement statutes have faced criticism relating to the degree they infringe on First Amendment rights. Some critics argue that the Supreme Court’s analysis of defamation claims should be applied to agricultural disparagement statutes. Using the defamation analysis, many of the agricultural disparagement statutes are criticized as unconstitutional for lacking a sufficient fault standard, not requiring plaintiffs to prove falsity, and not requiring proof that the statements were “of and concerning” the plaintiff’s product.<sup>7</sup>

However, contrary to these negative assertions, states have adopted strict requirements of proof for a disparagement action to proceed under their statutes. Supporters of agricultural disparagement statutes argue that these statutes are not designed to insulate agriculture from criticism, but to require persons and groups who criticize agriculture to do it truthfully, without lies and innuendo.<sup>8</sup>

This paper will analyze how several different states have approached agricultural disparagement statutes in efforts to protect their unique economies and agricultural industries. Specifically, this paper will examine how six different state legislatures (Texas, North Dakota, Idaho, Alabama, Georgia, and Colorado) have used

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<sup>3</sup>See Rawn Howard Reinhard, Note, The Tort of Disparagement and the Developing First Amendment, 1987 Duke L.J. 727, 730 (1987).

<sup>4</sup>See Restatement (Second) of Torts § 629 (1977).

<sup>5</sup>See Hagy at 856.

<sup>6</sup>See Megan W. Semple, Note, Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws, 15 VA ENVTL. L.J. 403, 412 (1996), (discussing the reasoning behind Colorado’s first attempt at enacting an agricultural disparagement law)

<sup>7</sup>See Lisa Dobson Gould, Mad Cows, Offended Emus, and Old Eggs: Perishable Product Disparagement Laws and Free Speech, 73 Wash. L. Rev. 1019, 1037 (1998).

<sup>8</sup>Kevin A. Isern, Limitations on Commercial Speech: The Constitutionality of Agricultural Disparagement Statutes, 10 De-Paul Bus. L.J. 233, 257 (1998).

different approaches in passing agricultural/perishable product disparagement statutes to meet the unique needs of their state. While there has been previous analysis on the constitutionality of these statutes as a whole based on their elements for causes of action, I argue that each state's agricultural disparagement statute should be evaluated within the appropriate and specific context. This entails an individual analysis for each state - based on that state's primary agricultural industry, the public's perception of that industry, and the actual consumers of those specific agricultural products. The state legislatures that enacted agricultural disparagement statutes had unique intentions behind their involvement and a unique market they wanted to protect. (For example, the market for a tobacco product would differ greatly from the market for apples.) Above all, these states wanted to maintain consumer confidence in their agricultural products and deemed it necessary to enact statutes that would prevent this confidence from becoming eroded by false public criticism.

### In the beginning... Auvil v. CBS "60 Minutes"

It all started with some apples, a news-creating program, and a credulous public. On February 26, 1989 the CBS television program "60 Minutes" aired a segment on the industry use of daminozide on apples. Daminozide is more commonly known by its trade name, Alar. Alar is used as a growth regulator and allows fruit to remain on the tree longer. Apples have an improved appearance, decreased irregularities, increased size, and longer storage life with the use of Alar.<sup>9</sup>

Opening with a lengthy shot of a red delicious apple emblazoned with a skull and crossbones, the segment was thick with drama, included seemingly reputable sources, and ended with a dire warning for the public that consumers could not distinguish apples sprayed with Alar from Alar-free apples.<sup>10</sup> Sources in the

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<sup>9</sup>Auvil v. CBS "60 Minutes", 800 F.Supp. 928, 930 (E.D. Wash. 1992) (describing reasons for using Alar in apple production)

<sup>10</sup>See id.

news program included the Natural Resources Defense Council, which had expressed concern over research indicating that Alar degrades into a carcinogen.<sup>11</sup> Janet Hathaway, senior attorney for the NRDC, spoke with certainty that Alar would cause thousands of children to contract cancer.<sup>12</sup> Dr. John Graef, a professor of pediatrics at Harvard Medical School, quoted that children are at even greater risk to the dangers of Alar than adults.<sup>13</sup> Ed Bradley, who narrated the segment, even proclaimed that when apples are processed into apple juice or apple sauce, Alar degenerates into a compound that is also used as rocket fuel.<sup>14</sup>

The economic result of this news program was devastating. Although there was not scientific evidence that any harmful effects could be attributed to Alar and most growers in the Washington State did not use Alar, everyone in the Washington apple industry suffered millions of dollars in losses. Growers lost their homes and livelihoods. Entire communities were thrown into depression.<sup>15</sup>

Eleven Washington state growers filed a class action lawsuit on behalf of 4,700 growers. Their lawsuit was eventually dismissed because of inability to prove the report on carcinogenic effects was false.<sup>16</sup> CBS never had to prove that the news segment was true even though the report devastated thousands of families.

The agriculture industry responded swiftly, lobbying their state legislatures to enact agricultural disparagement statutes where common law disparagement would not reach. To date, at least 13 states have enacted these statutes including Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, and Texas.<sup>17</sup> While Colorado's statute enforces a criminal penalty, the statutes of the other 12 states are similar in their definition of a statutory cause of action for civil liability.

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<sup>11</sup>See *id.*

<sup>12</sup>*Id.* at 938.

<sup>13</sup>*Id.* at 939.

<sup>14</sup>*Id.* at 940.

<sup>15</sup>*Id.* at 931.

<sup>16</sup>*Id.*

<sup>17</sup>See Hagy at 858.

Six of the states include four major provisions of 1) a statement of legislative intent, 2) a definitions section, 3) a statement of a cause of action for disparagement, and 4) a statute of limitations.<sup>18</sup> The remaining states omit either the statute of limitations or the statement of legislative intent. While the states' statutes have these structural similarities, the statutes differ considerably with regard to who is allowed a cause of action, the standard of conduct that triggers liability, the requirement of falsity, and the type of recovery available.<sup>19</sup>

## Texas

Texas enacted the False Disparagement of Perishable Food Products Act in 1995 to protect the state's agricultural and aquacultural industry.<sup>20</sup> The Texas bill applies only to perishable goods. The legislature wanted to protect those in the agricultural industry whose goods would have rotted and become unusable before an erroneous public statement could be rectified or before members of the industry would have the opportunity to prove the false statement was inaccurate and untrue. Non-perishable goods did not receive protection because they could be stored and used later when the effects of the false bad publicity had dissipated.

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<sup>18</sup>Id. at 859.

<sup>19</sup>Id. at 860.

<sup>20</sup>V.T.C.A., Tex. Civ. Prac. & Rem § 96.001 (West 2000) reads as follows:

In this chapter, "perishable food product" means a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.

V.T.C.A., Tex. Civ. Prac. & Rem § 96.002 (West 2000) reads as follows:

(a) A person is liable as provided by Subsection (b) if: (1) the person disseminates in any manner information relating to a perishable food product to the public; (2) the person knows the information is false; and (3) the information states or implies that the perishable food product is not safe for consumption by the public.

(b) A person who is liable under Subsection (a) is liable to the producer of the perishable food product for damages and any other appropriate relief arising from the person's dissemination of the information.

The Texas legislature enacted the statute after recognizing that the state's agricultural industry was particularly vulnerable to "the careless or malicious use of false or misleading information and the subsequent market effect."<sup>21</sup> In addition, the legislature wanted to ensure that "claims about the health, safety and wholesomeness" of the food produced in Texas "are based on reasonable, reliable scientific data, not sensationalized claims made by groups or individuals seeking publicity for their agendas".<sup>22</sup>

The Texas legislature realized and noted the threat that unsubstantiated negative media could have on Texas' agricultural economy and sent a warning that Texas law would provide a cause of action and remedy for those affected by fact-less assertions by the media and other groups. The legislative history of the False Disparagement of Perishable Foods Act details the skepticism that supporters of the Act had towards the media, "Special interest groups have a vested interest - sometimes motivated for their need for publicity - in keeping the public agitated about the safety of food products. The willingness of the news media to disseminate sensational claims about food safety, without investigating the claims, has hurt the agriculture industry."<sup>23</sup> Not all Texas legislators were supportive of the Act, some being concerned with its broad reach and prospect of rampant litigation.<sup>24</sup>

The economic threat that false negative publicity of Texas agriculture could have on the state is significant. The Texas state economy relies heavily on agriculture: agriculture is the 2<sup>nd</sup> largest industry in Texas, 1 of every 5 Texas has a job in the agricultural industry, agriculture generates more the \$45 billion in economic activity across Texas, and Texas produces nearly 25% of the beef that is consumed nation-wide - more than any other state.<sup>25</sup>

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<sup>21</sup>House Comm. On Agriculture and Livestock, Bill Analysis, H.B. 722, 74<sup>th</sup> Leg. (Tex. 1996)

<sup>22</sup>See Id.

<sup>23</sup>See House Comm. On Agriculture and Livestock, Bill Analysis, H.B. 722, 74<sup>th</sup> Leg. (Tex. 1996).

<sup>24</sup>See H.J. of Tex., 74<sup>th</sup> Leg., C.S. H.B. 722 (1995) (Representatives Bailey and Dutton proposed a tongue in cheek amendment, later dropped, that would provide immunity to comedians earning less than \$17,000, French chefs and chefs with credible French accents, former presidents, people younger than 13, and comments by anyone able to demonstrate the food was "icky tasting.")

<sup>25</sup>See Texas A&M Agriculture Program, Interesting Facts, <http://agprogram.tamu.edu/programs/factstext.html>; See also

On April 16, 1996, cattlemen operating in the panhandle of Texas had an opportunity to try out the new Texas statute with the airing of the Oprah Winfrey program entitled, “Dangerous Food” which included a segment on Bovine Spongiform Encephalopathy (BSE). BSE is commonly known as “Mad Cow Disease” and is associated with a variant that affects humans called Creutzfeldt-Jakob Disease (CJD). Both BSE and CJD are characterized by the formation of holes in the brain.<sup>26</sup>

The topic of the show was created in a brainstorming session by Alice McGee, a senior supervising producer, and James Kelley, an editor.<sup>27</sup> A researcher for the show interviewed numerous officials at the Center for Disease Control, U.S. Department of Agriculture, and several professors and researchers who all expressed their opinion that “Mad Cow Disease” could not occur in the United States. However, the researcher finally got a positive response from Mr. Howard Lyman, a vegetarian who is the director of the Humane Society’s Eating with Conscience campaign, who asserted that “Mad Cow Disease” could produce an epidemic in the United States worse than AIDS.<sup>28</sup> As expected, Mr. Lyman was invited as a guest for the show.

During the airing of the show Mr. Lyman claimed that a BSE-CJD outbreak could occur in the U.S. because of the feeding practices of cattle operators. Two other guests on the show, Dr. Will Hueston representing the USDA and Dr. Gary Weber representing the National Cattlemen’s Beef Association, argued that U.S. beef was safe. However, they were largely edited out of the program, including eight minutes of Dr. Hueston’s statements being edited down to only 37 seconds for the broadcast.<sup>29</sup> Also edited out of the program was Howard Lyman’s own admission that U.S. beef was safe.

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<http://www.fsa.usda.gov/TX/general.htm>.

<sup>26</sup>Texas Beef Group v. Winfrey 11 F.Supp.2d 858, 860. (N.D. Tex 1998)

<sup>27</sup>Texas Beef Group v. Winfrey, 201 F.3d 680, 682 (5<sup>th</sup> Cir. 2000)

<sup>28</sup>Id. at 683.

<sup>29</sup>Id.



After the April 16, 1996 broadcast of the “Dangerous Food” program, the cattle market in the Texas Panhandle decreased dramatically from a pre-airing value of \$61.90 per hundred weight down to a post-airing price in the mid 50’s.<sup>30</sup> Volume of sales also decreased. On the actual day of the show, the live cattle futures market at the Chicago Mercantile Exchange reached its limit-down decrease of \$1.50 per hundred weight within one hour of the show’s 9 a.m. broadcast and caused the trading pit to close for the day.<sup>31</sup> Cattle operators and traders in live cattle futures dubbed it the day of the “Oprah crash”.

One week later, Dr. Weber and another cattle rancher were invited back on the show to refute the “Dangerous Food” broadcast and concluded by assuring viewers that the U.S. cattle market was safe. However, these measures were inadequate to restore the live cattle prices for ranchers in the Texas panhandle to pre-show levels.

## **Case History**

On May 28, 1996 the Texas panhandle cattlemen filed suit in district court against Oprah, Howard Lyman, and the show’s production company (Harpo). The cattlemen claimed over \$10.3 million in damages resulting from the show’s impact on cattle prices.<sup>32</sup> The case went to trial in January of 1998. The claims included, among others, liability under the Texas False Disparagement of Perishable Food Products Act and a separate claim of business disparagement. The defendant moved for judgment as a matter of law on all of the claims, where the court ruled against the cattlemen on the perishable food act. The jury was charged only with

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<sup>30</sup>Id at 684.

<sup>31</sup>Id. at 684

<sup>32</sup>See <http://www.cnn.com/US/9801/27/oprah.beef/>

deciding the business judgment claim, on which the plaintiffs eventually lost.<sup>33</sup> The plaintiffs appealed to the 5<sup>th</sup> Circuit Court of Appeals arguing, among other items, that the food disparagement claim was wrongfully terminated. The plaintiffs lost on all counts in a decision reached February of 2000.

The Texas legislature and cattlemen were stunned with the courts' decisions in regard to the False Disparagement of Perishable Food Products Act. It was the bedrock of their case and best opportunity for recovery. The problems with the cattlemen's case was that their product was not sufficiently "perishable" as defined under the Act.<sup>34</sup> The district court understood that fed cattle in a feed lot would lose value and become less profitable if cattle operators waited for market recovery from an unforeseen shock. However, the court justified the dismissal by asserting that the cattle would not become value-less from this delay. The 5<sup>th</sup> Circuit declined to address the issue of whether cattle should be considered a "perishable food product" as defined by the Texas Act, and looked instead at whether the defendants knowingly disseminated false information about beef.<sup>35</sup> Finding against the cattlemen, the appeals court reasoned that Oprah could rely on the opinions of Lyman, and that it could not be proven that Lyman knew his statements were false.<sup>36</sup> Also, claims based on the editing of a news program require a strict standard of proof, which was far short in this circumstance.<sup>37</sup> The cattlemen lost their right to challenge the jury instruction on appeal because of their counsel's failure to challenge the instruction at the initial trial.<sup>38</sup>

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<sup>33</sup>Id. at 685

<sup>34</sup>Texas Beef Group v. Winfrey 11 F.Supp.2d 858, 863. (N.D. Tex 1998)

<sup>35</sup>Texas Beef Group v. Winfrey, 201 F.3d 680, 687 (5<sup>th</sup> Cir. 2000)

<sup>36</sup>Id. at 688-689 (5<sup>th</sup> Cir. 2000)

<sup>37</sup>Id.

<sup>38</sup>Id. at 689

While the outcome of the Texas cattlemen was certainly not favorable, the legality and status of the Texas False Disparagement of Perishable Food Products Act seems to have remained intact. The federal district and appeals court both declined to delve into the constitutionality of the Act, and instead based their decisions on definitions the Texas Legislature used in drafting the Act.

Critics of the district court's definition of "perishable food product" have credible arguments on why cattle should be considered within the definition.<sup>39</sup> They assert the fact that there is a window of time for cattle to achieve a finished weight. After this window has lapsed, cattle begin to accumulate fat instead of muscle - decreasing their marketability. The health conscience public places a premium on fat content in meat and will not purchase beef that is laden with fat, just as the public would not purchase fruit that is too soft or ripe.

Failure of the Act to protect the Texas cattle industry, plus greater public scrutiny and resentment towards litigation, have brought proposals to repeal or modify it.<sup>40</sup> These proposals have been rejected thus far. However, the legitimacy of the Texas Act and agricultural disparagement statutes as a whole may end up being shaped by the Oprah cases even though the courts did not opine on the lawfulness of these statutes. The Texas statute has received further media attention and ridicule for another lawsuit involving Texas emu ranchers and the Honda corporation. In 1997, Honda aired a tongue-in-cheek commercial where one of the actors stated, "Emus, Joe. It's the pork of the future."<sup>41</sup> The ranchers filed suit in federal court alleging \$75,000 in damages. The ranchers were not successful and merely gave further ammunition to critics of agricultural disparagement statutes.

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<sup>39</sup>See Isern at 250.

<sup>40</sup>See Eric Jan Hansum, Where's the Beef? A Reconciliation of Commercial Speech and Defamation cases in the context of Texas's Agricultural Disparagement Law, 19 Rev. Litig. 261, 266; H.B. 126, 76<sup>th</sup> Leg., R.S. (Tex. 1999) (attempting to repeal the Act); H.B. 902, 76<sup>th</sup> Leg., R.S. (Tex. 1999) (shifting court costs and attorney's fees to the losing party)

<sup>41</sup>See Ronald K.L. Collins and Paul McMasters, Veggie Libel Laws Still Out to Muzzle Free Speech, Texas Lawyer, March 30, 1998, at <http://www5.law.com/tx/today00/033098e.htm>

The Texas Beef Group's pursuit of recovery may have hurt other agricultural industries who would have had a stronger claim with the Texas Act. The Texas Beef Group may not have expected recovery at all, but sought to send a warning to critics of the beef industry that untrue negative statements would be met with prolonged and costly litigation. (The Texas Beef group extended the Oprah litigation for over 4 years.) Some commentators view the Oprah litigation a success for all state agricultural disparagement statutes by interpreting it as a test case for the constitutionality of these statutes. Because neither the district nor the appeals court could find that the Texas Act violated 1<sup>st</sup> amendment rights, it could be inferred that these statutes are generally permissible. However, it may be more likely that the court chose the easiest path to reaching a decision and did not want to get mired down in a decision with constitutional implications.

### North Dakota

North Dakota is one of the states that has enacted an agricultural disparagement statute most recently. Indeed, North Dakota enacted its Agricultural Product Defamation Act in 1997, after the Texas cattlemen had filed their first complaint in the Oprah lawsuit. However, their belated effort in enacting an agricultural disparagement statute is not a measure on the importance that such a statute could serve in the state's agricultural industry and economy.

Agriculture is North Dakota's major industry, comprising 38% of the economic base of the state; 24% of the state's employment is related to farm or farm-related jobs. The state's two most important crops are wheat (at 38%) and cattle (at 12%).<sup>42</sup> The state's heavy reliance on agriculture within their economy, and external factors that affect the value of agricultural output (such as weather, price changes, farm policy, and foreign trade), cause North Dakota's net farm income to experience significant year to year volatility.<sup>43</sup>

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<sup>42</sup>See Agriculture and North Dakota, [http://www.umanitoba.ca/afs/agric\\_economics/ardi/agricandndecon.html](http://www.umanitoba.ca/afs/agric_economics/ardi/agricandndecon.html)

<sup>43</sup>See Id. citing, Coon, R.C., F.L. Leistritz, and T.A. Majchrowicz. 1992.

North Dakota's Agricultural Product Defamation Act, is similar to other states' agricultural disparagement statutes by providing a cause of action against someone who disseminates false and disparaging information about an agricultural industry or product.<sup>44</sup> Some of the unique aspects of the North Dakota statute is that it also covers statements made about the management of an agricultural operation, and that it provides treble damages for statements made with malice.<sup>45</sup> Another notable aspect of the statute is that it provides a cause of action for each individual who is part of a general class or group whose agricultural products have been disparaged, regardless of the size of the class.<sup>46</sup>

However, the most unique aspect of the North Dakota statute resides in the lobbying group who pushed for its passage. The North Dakota Equine Ranching Association is a group of twenty-nine ranches who collect pregnant mares' urine and sell it to pharmaceutical companies who use it to produce Premarin- an artificial estrogen that is often prescribed in human pregnancy. The urine is collected from approximately 75,000 horses each year by attaching rubber sacks to the pregnant mares' groins.<sup>47</sup> To increase the estrogen content of the urine, the horses are not given free access to water.<sup>48</sup> The Equine Association was the only group who presented the North Dakota legislature with specific instances of product disparagement and a proposed use for the statute.<sup>49</sup> As a result, the North Dakota statute covers agricultural practices as well as products.<sup>50</sup>

The equine ranchers get further protection from sections of the statute allowing individual claims for group

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The role of agriculture in the North Dakota economy. Agricultural Economics Statistical Series Report No. 50. North Dakota State University: Department of Agricultural Economics and Institute for Business and Industry Development.

<sup>44</sup>N.D. Cent. Code ss 32-44-01 to -04 (Supp. 97)

<sup>45</sup>See Id.

<sup>46</sup>See Id.

<sup>47</sup>See <http://www.findings.net/premarin.html>

<sup>48</sup>See Id.

<sup>49</sup>Jennifer J. Mattson, North Dakota Jumps on the Agricultural Disparagement Law Bandwagon by Enacting Legislation to Meet a Concern AL 74 N.D. L. Rev. 89, 106-107 (1998) (animal rights groups and the national media have claimed the ranchers mistreat and abuse their horses).

<sup>50</sup>N.D. Cent. Code s 32-44-01(2) (Supp. 97)

disparagement.

The “tailor made” quality of these and other agricultural disparagement statutes strikes a nerve with some commentators who argue that statutes with specific protections are even more violative of 1<sup>st</sup> ammendment rights.<sup>51</sup> What these commentators have failed to realize is that almost EVERY state and federal statute that is passed has unique provisions to accommodate specific groups that need additional protections.

Although North Dakota’s agricultural disparagement law has not been tested in the federal courts for its constitutional legality, it provides an interesting legislative history for a state with significant dependence on agriculture for its economic vitality.

### Ohio

Ohio enacted its own agricultural disparagement statute with an eye and ear towards the critics. However, litigation between a public interest foundation and an egg company hurt the statute’s legitimacy.

The Ohio legislature was initially concerned about the perception that their agricultural disparagement statute was passed merely because of the lobbying effort of the agricultural industry. The legislature actually inserted language within the statute to cite the beneficiaries of the agricultural disparagement statute. The statute asserts the right of the public to receive truthful information regarding their food. The statute also proclaims to guard the welfare of the food consuming public, the economy of the state, and those involved in the agricultural industry.<sup>52</sup>

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<sup>51</sup>See David J. Bederman, Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes, 34 Harv. J. On Legis. 135, 136 (1997) (explaining that tailor-made torts for agricultural disparagement are more intrusive on free speech rights than generalized tort statutes).

<sup>52</sup>See Ohio Rev. Code Ann. § 2307.81(A).

In statistics compiled by the Ohio Department of Agriculture in cooperation with the USDA, Ohio ranks first in the nation in egg production, within the top five in the nation in many categories of processed dairy products (including but not limited to Swiss cheese, cottage cheese, and ice cream), and is the leading state in the nation in the number of livestock slaughter houses.<sup>53</sup> With this data, it is evident that the nation significantly depends on Ohio's agricultural output for some of the staple food supplies we use everyday. In turn, Ohio's economy is largely dependent upon agriculture, specifically the slaughtering plants and egg production.

In 1997, the Ohio Public Interest Group (OPIG) issued a warning to the public that Buckeye Egg engaged in the practice of repackaging and redating eggs for sale to the public. Although it was not proven that any of these eggs made persons ill, OPIG issued a statement that exaggerated the enormity of the situation and ended with a dire warning that they did not know how many people had consumed these eggs and were made ill. Agrigeneral Co. filed a lawsuit on behalf of Buckeye Egg against OPIG using Ohio's agricultural disparagement statute, but later dropped the lawsuit a year later amid derision from the media. Media attention was given to the defendant's claims of working in the public interest and the lack of monetary remedy because of the defendant's finances. Certainly, the lawsuit was intended as a warning to OPIG and others that any false public statements would be met with costly litigation. However, in this case, the defendant did not have resources for litigation and relied instead on pro-bono counsel.<sup>54</sup>

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<sup>53</sup>See <http://www.state.oh.us/agr/97AnnIRpt/TOC.HTM>

<sup>54</sup>The plaintiff was represented by Jones, Day, Reavis, and Pogue whereas the defendant was represented by pro-bono counsel of David Marburger of Baker and Hostetler.

The media surrounding the Buckeye Egg case and criticisms of the Ohio agricultural disparagement provision gave such statutes another setback in achieving legal legitimacy. The statute has been used infrequently in Ohio since its passage.

## Idaho

Idaho's perishable product statute is atypical from previous statutes that have been discussed. The standards of what constitutes an actionable tort is narrower in Idaho's version of the agricultural disparagement statute. Rather than allowing a claim for generic statements criticizing an agricultural industry, such as the statutes in Texas and Ohio, Idaho's statute is not applicable unless the disparaging statement is specific to a plaintiff's particular agricultural product.<sup>55</sup> A plaintiff making a claim under the statute also bears a greater burden of proof than other states' statutes.<sup>56</sup> Recovery is limited to actual pecuniary damages under the Idaho statute - making alternative courses of common law action a more attractive route for monetary remedy. Idaho's enactment of an agricultural disparagement statute is not surprising. Idaho has a lot to protect, agriculturally speaking. It is most famously known for its potatoes, being the number one producer of potatoes in the U.S. by providing a whopping 29% of the nation's crop.<sup>57</sup> They are also the number one producer of various varieties of beets, peas, and trout.<sup>58</sup> It is not surprising in this vast and rural state that agriculture is the number one industry, worth \$3.4 billion annually in the value of production.<sup>59</sup>

Typical criticisms of a state's agricultural disparagement statute are that they are too generic, infringe on free speech, and are merely the product of lobbying and political muscle. However, Idaho's statute faces

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<sup>55</sup>Idaho Code §6-2003(4)

<sup>56</sup>Idaho Code §6-2003(2)

<sup>57</sup>See Idaho Agricultural Statistics Service at <http://www.nass.usda.gov/id/>.

<sup>58</sup>See id.

<sup>59</sup>See id.



unusual criticism that it is too constitutional, and practically useless.<sup>60</sup> During the drafting of the Idaho statute, the legislature's concerns with free speech infringement led it to specifically omit a cause of action for general product disparagement. Therefore, the state's agricultural industry is without a remedy if a false and public criticism is broadcast without addressing a specific producer of the agricultural product. The legislature of Idaho essentially adopted an agricultural disparagement statute that would comply with the U.S. Supreme Court's analysis of the defamation statutes.<sup>61</sup> While even the common law recognizes the different claims of product disparagement and defamation, the Idaho legislature erred on the side of caution by holding its disparagement statute to the strictest of standards.

Idaho's code would be the most sturdy of the disparagement statutes under a constitutional challenges, but it fails to realistically protect the economic interests of the state's agricultural producers. The legislature placed priority on the constitutionality rather than the practical effectiveness of the statute. Some commentators express doubt that the Idaho statute will ever be utilized.<sup>62</sup> The weak statute may be a reflection of the legislature having consulted and submitted a draft bill to the Idaho Attorney General for approval.<sup>63</sup>

Another fact to consider is that Idaho's main agricultural products - potatoes, beets, and peas - do not typically receive much criticism or attention from public activists. Idaho may have not really needed an agricultural disparagement statute but the legislature was obliged to pass one to show support for agricultural producers in the state.

## Alabama

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<sup>60</sup>See generally Anthony F. Caffey, III, Idaho's Disparagement of Agricultural Food Products Statute: Too Constitutional?, 3 TMCJPL 25 (1999).

<sup>61</sup>Id. at 50.

<sup>62</sup>See Lisa Dobson Gould, Mad Cows, Offended Emus, and Old Eggs: Perishable Product Disparagement Laws and Free Speech 73 Wash. L. Rev. 1019, 1026 (1998).

<sup>63</sup>See David J. Bederman, Scott M. Christensen, and Scott D. Quesenberry, Of Banana Bills and Veggie Hate Crimes: The Constitutionality of A, 34 Harv. J. On Legis, 135, 149 (1997).

In direct contrast to Idaho's agricultural disparagement statute, which meets and exceeds constitutional provisions for protecting the defendant's rights, is Alabama's statute with the most lenient of requirements for a cause of action. Alabama is the only state that allows a cause of action regardless if the defendant is at fault in making a false and disparaging statement about the state's agricultural products. Therefore, a false statement, made in ignorance, is actionable in Alabama.<sup>64</sup> In addition, Alabama is one of only two states that has a presumption of falsity for statements that are not based upon reasonable and reliable scientific evidence.<sup>65</sup> The statute fails to state who bears the burden of proof.

Why did the Alabama legislature give such liberal treatment to the agricultural disparagement statute? It is possible that the legislature acted in disregard to the constitutional concerns that have been raised against product disparagement statutes. The agricultural economy of the state may also have been an influence.

By far, the primary agricultural commodity of Alabama is broilers (meal chickens). Broilers compose of 54.7% of the state's total farm receipts.<sup>66</sup> Alabama supplies 12.4% of the broilers nation wide. Broiler production contributed \$1.63 billion to the state's economy in 1996.<sup>67</sup>

Because of Alabama's prominence in the poultry industry, they have also faced harsh criticisms from animal rights groups such as PETA. There have been many "investigative" news reports, newspaper articles, and magazine articles that have criticized the poultry industry at the prompting of PETA and other groups. Indeed, within the last decade, the poultry industry has faced the most criticism in the agricultural industry.

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<sup>64</sup>See Alabama Code §§6-5-621 and 6-5-623. ("it is no defense under this article that the actor did not intend, or was unaware of, the act charged.")

<sup>65</sup>See Ala. Code §6-5-621.

<sup>66</sup>Economic Research Service, U.S. Department of Agriculture (1999) at <http://www.ers.usda.gov/statefacts/AL.HTM>

<sup>67</sup>See Alfafarmers, Poultry Facts at <http://www.alfafarmers.org/farmfact/poultry.html>

Unlike the well funded and organized beef industry, the poultry industry has more independent operations that have not mounted a public relations defense to these criticisms. The Alabama legislature may have responded by making it easier for independent farmers to pursue a financial remedy for negative publicity generated by their opponents. For a state that has one of the highest poverty ratios in the U.S., and where a great percentage of the farms are small, independent, and family operated, such protection may have been needed to guard the state's economy.

## Georgia

Georgia's perishable product disparagement act was effective in 1993, not long after the Auvil case was decided. It provides a cause of action producers, marketers, or sellers to recover damages for the disparagement of any perishable product or commodity.<sup>68</sup> Along with Alabama, it is the only state where there is a presumption of falsity if a statement is not based upon reasonable and reliable scientific evidence.<sup>69</sup> Therefore, the plaintiff does not need to prove that the statement is false. He must only show that that there is not scientific evidence to support the defendant's claim. This similar aspect between Alabama and Georgia might be better understood if one looks at the similar agricultural economy between the two.

Everyone knows that Georgia is famous for its peaches. However, the agricultural commodity that drives Georgia's economy is the same as Alabama, broilers. Georgia is the number one exporter of broilers in the United States, comprising 43.8% of the state's total farm receipts and representing 15.2% of the poultry and poultry products used in the nation.<sup>70</sup> Georgia is also the leading exporter of peanuts in the nation,

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<sup>68</sup>Georgia Code 2-16-2; 2-16-3

<sup>69</sup>Georgia Code 2-16-2(1).

<sup>70</sup>Economic Research Service, U.S. Department of Agriculture (1999) at <http://www.ers.usda.gov/statefacts/GA.HTM>

comprising 7.3% of the state's total farm receipts.<sup>71</sup>

Georgia's reasons for enacting a statute that allows for the unique presumption of falsity might be similar to the points discussed above with respect to Alabama. The poultry industry's individualization, lack of strong organizational PR efforts, and constant target of critical media and animal rights groups may have forced the legislature to give stronger protections to plaintiffs in the state's agricultural disparagement law.

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<sup>71</sup>See *id.*

## Colorado

Colorado's perishable product disparagement law is unique from any other state's statute because it provides for criminal sanctions rather than civil liability. The Colorado legislature's first attempt enacting an agricultural disparagement statute was vetoed by the Governor on First Amendment grounds.<sup>72</sup> However, the Governor allowed the legislature to amend a criminal statute to make it unlawful to knowingly make false statements about food products.<sup>73</sup> Specifically, the statute prohibits the destruction (including decay) of food. It was amended to cover persons who issue false statement, causing the destruction of food.<sup>74</sup>

Colorado's primary agricultural commodities are cattle and calves, comprising over 50% of the state's total farm receipts and 6.4% of the nation's total value.<sup>75</sup> It ranks as the 5<sup>th</sup> state in receipts from livestock. In this respect, Colorado is similar to Texas' agricultural economy, although it is much less diversified.

Despite the governor's constitutional concerns, the Colorado legislature was intent on protecting their agricultural economy, and amended their criminal code to account for shortcomings in civil remedies. Although the law exists in the criminal code, it is doubtful that many, if any, people will ever be charged with causing the decay of food by making erroneous statements concerning its quality. The existence of the statute is more of a statement of support for the state's agricultural industries.

## Conclusions

Agricultural/perishable product disparagement statutes are a creation by individual state legislatures to

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<sup>72</sup>See Anthony F. Caffey, III, Idaho's Disparagement of Agricultural Food Products Statute: Too Constitutional?, 3 TM-CJPCL 25, 31 (1999).

<sup>73</sup>See Hagy at 859.

<sup>74</sup>Colorado Statute §35-31-101 ("It is unlawful for ... [anyone] knowingly to make any materially false statement, for the purpose of maintaining prices or establishing higher prices for the same, or for the purpose of limiting or diminishing the quantity thereof available for market, or for the purpose of procuring, or aiding in procuring, or establishing, or maintaining a monopoly in such articles or products, or for the purpose of in any manner restraining trade, any fruits, vegetables, grain, meats, or other articles or products ordinarily grown, raised, produced, or used in any manner or to any extent as food for human beings or for domestic animals).

<sup>75</sup>Economic Research Service, U.S. Department of Agriculture (1999) at <http://www.ers.usda.gov/statefacts/CO.HTM>

protect their state's agricultural economies. Their constitutionality and reasonableness should not be judged on the whole, but should be based on a complete evaluation of each state's specific economy. Too often, legal and public criticism of these statutes has been made in a vacuum. These critiques have ignored the individuality of each state's economy and its dependence upon a specific agricultural industry. The validity of an agricultural/perishable product disparagement statute should be based on a more thorough evaluation of the industry that the state is trying to protect and whether that industry requires special protection.

Any determination of the reasonableness of a state's agricultural/perishable product disparagement statute should also include an evaluation of the level of threat that a state's agricultural economy faces. States, such as Idaho, who have adopted strict standards for plaintiffs claims, probably face less erroneous criticism than states, such as Alabama, who have adopted more lenient standards.

Agricultural/perishable product disparagement statutes can serve a valuable function for states by helping to preserve their agricultural economy in spite of erroneous harmful publicity. If these statutes gain public and legal acceptance, they could be an effective tool for deterring false statements issued by groups with self-interested agendas.